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UNCLAS SECTION 01 OF 02 GABORONE 000738

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SUBJECT: COURT OK'S DEPORTATION OF CRITICAL ACADEMIC

REF GABORONE 293

1. (SBU) SUMMARY: Botswana's High Court has upheld the constitutionality of a Presidential decree declaring critical academic Professor Kenneth Good a prohibited immigrant subject to deportation. Attorneys for the 70-year-old gadfly had argued that Good's deportation would violate his right to free expression. Following the ruling against them, Good's lawyers pleaded for a further stay of execution to allow him to appeal the decision while still in the country. The Court denied this request. The judgment in this case explicitly reinforces the power of the executive in Botswana and legitimizes the limits to the Government's accountability to its citizens. END SUMMARY

DEPORTATION OF CRITIC CONSTITUTIONAL

2. (U) On May 31, High Court Judge Stanley Sapire delivered a judgment in the legal challenge filed by University of Botswana Professor Kenneth Good against a deportation order issued by the GOB after President Mogae declared Good a prohibited immigrant (reftel). Good's attorneys argued that this declaration was prompted by his criticism of the Government and, as such, his deportation would violate his right to free expression. In an affidavit, President Mogae stated that he had received reliable information that the aging academic was a threat to national security and under section 13.6 of the Constitution and section 36.1 of the Immigration Act, declared Professor Good a prohibited immigrant.

3. (U) In its ruling, the High Court upheld as constitutional a law which exempts the President from disclosing the reasons for proclaiming one a prohibited immigrant, the information that led to such a conclusion, or the source of that information. The responsibility of the President to act in the public interest as he defines it, Judge Sapire continued, takes precedent over individual rights. Consequently, the deportation of Professor Good for undisclosed reasons would not be unconstitutional. Judge Sapire also noted that Mogae did not violate international treaties such as Article 13 of the International Covenant on Political and Civil Rights that obligated governments to give a person a hearing before declaring them a prohibited immigrant. The Court's judgment recognized that Botswana had signed certain international conventions that would bar deportation in such a circumstance but held that until the provisions of these agreements are incorporated into domestic law, they are not binding.

4. (U) Immediately following the reading of this judgment, Good's attorneys requested a second stay of execution to allow their client the chance to file a notice of appeal before being removed from the country. Allowing his expulsion while an appeal is pending, they argued, would preempt the judicial process. Judge Sapire replied that Good could pursue an appeal from outside Botswana and that the Court lacked the authority to issue such an interdict. Good could appeal, he concluded, but the Court would not prevent the execution of the deportation order against him.

GOOD TAKEN INTO CUSTODY AMIDST CONFUSION

5. (U) The reading of the judgment and plea for a stay of execution unfolded over a three-hour period, during which time the judge took two short recesses. Throughout the proceedings, approximately half a dozen plain clothes law enforcement officials sat along the wall beside and behind Good and his attorneys. After the reading of the judgment, two security officials followed Good everywhere he went including to the restroom and into a chamber where he consulted with his attorneys. Only after Good's lead attorney asked the Attorney General, who appeared on behalf of the Government, to allow him to converse with his client privately did the officials withdraw from that chamber.

6. (U) After Judge Sapire denied the request for a stay of execution, immigration officials began to escort Good to a

government vehicle. A representative of the Australian High Commission in Pretoria intervened seeking consular access. Although the GOB officials talked with the Australian diplomat for approximately fifteen minutes in the presence of Good and his attorneys, they refused to say where they were taking Good. They then shuffled Good into a car and drove away. Several hours later, the Ministry of Foreign Affairs and International Cooperation contacted the diplomat and allowed him to meet with Good. At 7:00 p.m. that night, Good was put on a flight to Johannesburg. The Australian official escorted him to South Africa.

COMMENT

17. (SBU) The fact that the High Court stayed the execution of the Government's deportation order on February 19, heard Good's allegations in an open court, and rendered a decision apparently without interference from the Government testifies to the independence of the judiciary in Botswana. However, by accepting the constitutionality of the President's ability to deport an immigrant without providing justification to the judiciary or to the public, the Court reinforced the imbalance of powers favoring the executive and legitimized a lack of accountability of elected officials to their constituents. Through its advocacy and public outreach, Mission will continue to stress the importance of transparency and checks on the power of the executive in a vibrant and stable democracy.

SUGGESTED PRESS GUIDANCE

18. (U) Post submits the following as suggested press guidance: Regarding the deportation from Botswana of Professor Kenneth Good, the United States notes that the judicial process has run its course and that the High Court of Botswana has upheld the constitutionality of the Government of Botswana's declaration of Professor Good to be a prohibited immigrant. The United States notes that Professor Good has lived in Botswana and worked at the University of Botswana for the last fifteen years. During that time he spoke out against corruption and in favor of accountability in government. The United States believes that the Government of Botswana shares these values and will continue to respect the freedom of expression that is necessary for a vibrant and stable democracy.

HUGGINS